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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FCC 93M-536
DISPATCHED BY 32196

In re Applications of)	MM DOCKET NO. 93-51
)	
MARTHA J. HUBER)	File No. BPH-911114ME
)	
RITA REYNA BRENT)	File No. BPH-911115MC
)	
MIDAMERICA ELECTRONICS SERVICE, INC.)	File No. BPH-911115ML
)	
STATON COMMUNICATIONS, INC.)	File No. BPH-911115MU
)	
For Construction Permit for a)	
New FM Station on Channel 234A)	
in New Albany, Indiana)	

MEMORANDUM OPINION AND ORDER

Issued: August 16, 1993; Released: August 18, 1993

Background

1. This is a ruling on Second Petition To Enlarge Issues Against Rita Reyna Brent filed on July 6, 1993, by Martha J. Huber ("Huber"). An Opposition was filed on July 21, 1993, by Rita Reyna Brent ("Brent"). Huber filed her Reply on August 2, 1993.

2. Huber seeks the following issues:

- A. To determine whether the transmitter site specified by Brent has been continuously available to her since the filing of her application.
- B. To determine whether Brent violated Section 1.65 of the Commission's rules by failing to report (a) the sale of her transmitter site and her loss of reasonable assurance of that site, and/or (b) the loss of the balance sheet she allegedly relied upon to certify to her financial qualifications.

Facts

The Tower Site

3. There is no question that Brent had a reasonable assurance of her tower site when she filed her application on November 15, 1991. At the time of filing, the owner of the site was Sam Lockart ("Lockart"). Mrs. Brent had not dealt directly with Lockart but used the services of Mr. George Owen as an intermediary. Mr. Owen is the cousin of the applicant's husband, Robert Brent. Mr. Owen is a radio broadcaster who would be familiar with tower sites.

4. On April 20, 1992, Lockart sold the site property to Pat Harrison ("Harrison"). Ms. Brent was not informed of the change in ownership until one year later. On April 21, 1993, while at a social function, Brent learned in a passing conversation with a friend that Lockart had sold the land. Brent took steps immediately thereafter to obtain a reasonable assurance of the site's availability from Harrison, the new owner.

5. Huber argues that from Lockart's sale to the date of the Harrison assurance, which was over a period of one year, Brent had lost her reasonable assurance of the site. And because Brent has never amended her application to report the Lockart/Harrison sale, or the one year hiatus of her reasonable assurance of a site, Huber asserts that there was a violation of the Commission's reporting requirements under §1.65.

6. Huber first learned of these facts through the transmission of a reporting memorandum on April 26, 1993, when a document that reported the sale to Harrison was exchanged. The document recasts the earlier agreement to substitute Ms. Harrison who signed an addendum which reflects her agreement to continue the first commitment to lease the land to Brent for use as an antenna site. See Attachment 4 to Huber's Second Petition. The sale was also a subject covered at the deposition of Brent that was taken by Huber on May 26, 1993. Brent asserts that Huber is knowledgeable in real estate matters and that Huber could have learned sufficient facts to seek an issue within 15 days of the exchange of the document. Huber did seek the issue within 15 days of her receipt of the deposition transcript on June 18, 1993. Huber contends that it was necessary to first complete Brent's deposition in order to learn whether Brent had obtained an oral agreement of reasonable assurance with the new owner, whether Brent had taken steps to maintain her reasonable assurance, and to determine Huber's state of mind in not reporting the event under §1.65.¹

Lost Balance Sheet

7. Brent relies on self financing through the funds and assets of herself and her spouse. See Memorandum Opinion And Order, FCC 93M-374, released June 17, 1993. Brent has asserted that she had on hand a balance sheet within 90 days of the date she signed her application. However, according to Brent, the balance sheet was lost and was being recreated by an accountant for use in this case. Brent also referred to the balance sheet in her Request For Permission To File Appeal submitted on June 21, 1993, wherein she asked for a deferral of her production of the balance sheet. In her responsive pleadings Brent failed to disclose that the balance sheet that she used for certification did not exist. It was only when she was required to produce the balance sheet that she disclosed for the first time, on June 28,

¹ The disclosure in the documentation dated April 26, 1993, was sufficient to base a motion for the added issue. Therefore, the issue could also be denied for procedural reasons. 47 C.F.R. §1.229(b)(3) (a party has 15 days after the discovery of new facts in which to seek an added issue). However, since the subject raises a question of decisional significance and substantial public interest, it will be addressed here on the merits. See 47 C.F.R. §1.229(c).

1993, that her accountant "had custody of the pre-filing balance sheet but lost or misplaced it." Under the circumstances, Huber's Petition To Enlarge was timely filed.

8. Huber contends that Brent had an obligation to report under §1.65 that the balance sheet was lost. Huber analogizes the situation here to the loss of a bank letter that was relied on for certification.

Discussion

9. The pertinent portions of the reporting rule provides:

Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ---. [W]henver the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

47 C.F.R. §1.65. The Court of Appeals has held that a reporting violation is disqualifying "only if evidence indicates that the applicant intended to conceal the information from the Commission, or if the reporting violations are so numerous and serious as to indicate irresponsibility." David Ortiz Radio Corp. v. F.C.C., 941 F.2d 1253, 1259 (D.C. Cir. 1991).

10. Brent did not know that Lockart had sold the antenna site to Harrison. There is no reason for holding Brent to a reporting duty until the reportable event occurs. In this case that would be on or shortly after April 21, 1993. Although Brent did not report by a formal amendment, on April 26, 1993, Brent advised the parties in a written communication of the fact that the property had been sold but that the purchaser had in effect endorsed the prior owner's commitment to Brent. There is no case cited by Huber in which a reporting issue was added under the same or similar circumstances. A reporting violation cannot be a basis for a comparative demerit. Character Qualifications, 102 F.2d 1179, 1230 - 1232 (1986). And a reporting violation can only be disqualifying if the evidence indicates that the applicant had intended to conceal the information from the Commission or if the reporting violations are so numerous and serious as to indicate irresponsibility. David Ortiz Radio Corp., *supra*. See also Valley Broadcasting Co., 4 F.C.C. Rcd 2611 (Review Bd 1989).

11. Brent is not responsible for reporting an event of which she has no knowledge. There is no evidence that she knew of the Lockart sale in 1992 but chose not to disclose the event to the Commission. Nor is there a recognized duty that Brent was required to monitor the status of the property, absent some outward manifestation such as a "For Sale" sign on the land for a period of time that would have put Brent on notice. It might have been a more prudent applicant who would have insisted on a provision in the Lockart

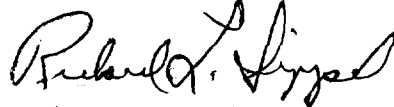
commitment for notice to Brent in the event of a sale. But there is no precedent for imposing that standard of care as a basis for a disqualifying reporting issue. See David Ortiz Corporation v. F.C.C., supra at 1259.

12. The lost balance sheet is not a reportable event under §1.65. That conclusion is particularly applicable here where Brent had given custody of the joint balance sheet to her accountant. When it was necessary to produce the document in discovery and it could not be located, Brent disclosed the fact that it was lost and she sought to comply in the only way possible, i.e., with a reconstructed financial statement. The Presiding Judge has ordered the production of all of the underlying data relied on by the accountant to reconstruct the document and the accountant would be made available for deposition discovery. See Order FCC 93M-488, released July 26, 1993. Without direct evidence of an intentional loss of evidence or some patently unreasonable explanation, it would be speculative on the present record to add a disqualifying issue against Brent for a failure to disclose the fact of a lost balance sheet prior to her duty to disclose discovery documents. The balance sheet is in the nature of highly reliable corroborating evidence. The document or the second-best reconstruction of the document are relevant. But it is a readily distinguishable situation from the loss of a bank letter which in itself forms the basis for a reasonable assurance of financing. Cf. Mark Allen Bodiford, et al. (Dkt. No. 89-292) Memorandum Opinion And Order, FCC 90M-392, released February 28, 1990.

Ruling

Accordingly, for the foregoing reasons, the Second Petition To Enlarge Issues Against Rita Reyna Brent filed on July 6, 1993, by Martha J. Huber IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge